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WORLD MARITIME UNIVERSITY

Malmö, Sweden

SHIP REGISTRATION: A CRITICAL ANALYSIS

By

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Belize

A dissertation submitted to the World Maritime University in partial fulfillment of the
requirements for the award of the degree of

MASTERS OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2010

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.



.....

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A C K N O W L E D G M E N T S

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A B S T R A C T

Ship Registration: A Critical Analysis

Masters of Science

Ship registration is inherently dynamic; however in the 20th century and on to the 21st changes in the industry have been unprecedented. For shipping to continue to realize growth and a buoyant future, decision makers must understand the nature of the issues facing it and act proactively. To provide context, the background focuses on historical milestones, examining nationality and the private and public law attributes of registration. Registry types are assessed in detail, as is the concept of genuine link.

This work offers insights into some of the challenges facing the industry in the areas of security, safety, crewing, taxes, and the overall registration process. It argues in favour of lifting the veil of anonymity afforded to shipowners and for initiatives that promote a culture of responsible shipping with a balance between competition and safety in the light of economic and security concerns. This dissertation asserts that the blurring of distinctions between open and national registers will continue and hybrid registers will be the future of shipping.

KEYWORDS: ship registration, flag State, genuine link, open registers, hybrid registers.

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CHAPTER I: INTRODUCTION

1.1 Purpose

Ship registration continues to be relevant and dynamic, adapting to the needs of international trade. The development of open registers heralded global competition, cost reduction, and ship innovation. National registers reacted by offering economic incentives and developing international registers to remain competitive.

The purpose of this dissertation is to explore the legal basis of ship registration, to examine the issues surrounding national and open registers, and to present a contemporary analysis of ship registration and insights into its future. An analysis of these issues is crucial due to the substantial changes that continue to occur as a result of the unprecedented growth of open registers in the twentieth century. This paper broadens the discussion by offering insights on the future of ship registration.

1.2 Background

The background of this dissertation will focus on the historical developments of registration and, in particular, upon the major developments that have taken place in the past half century, from the Geneva Convention on the High Seas, the United Nations Convention on the Law of the Sea, and the establishment of the International Maritime Organization (IMO). These are all essential as they give the context to the current status of shipping and also influence its future trajectory. The IMO Safety Committee reports in particular will be examined as they have been involved in the majority of the issues included in this text, from UNCLOS to port state control to VIMSAS. The extensive works of experts in the field such as Nigel Ready, Richard Coles, Edward Watt, and John Mansell's provide in-depth sources for issues impacting ship registration, and these will be looked at. Valuable

information on various aspects of registration, principally ‘genuine link’ from those like Moira McConnell, Henry Anderson, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade Development (UNCTAD) will also feature. Industry sources such as Lloyd’s Fairplay and journals will be utilized for useful material.

1.3 Discussion

The next step for this critical analysis of ship registration is to examine the principal parts of the law of ship registration. The key legal concepts of nationality, flag, and documentation will be explored. The concept of the flag as visible evidence of a ship’s nationality will be discussed followed by the introduction of nationality, the legal institution that links a ship to the state of nationality or the flag State. This is followed by a discussion on the public and private law purposes of ship registration.

Chapter Three expands on the legal milieu of Chapter Two. The recurring theme of nationality will also tie Chapters Two and Three through the historic principle of States’ sovereign rights to grant nationality and authorize ships to fly their flag. First the gradual development of registration will be traced from the emerging nation states of Europe in the twelfth century to the emerging maritime states of the twentieth century. The nationality theme will continue with codification of States’ sovereign rights in international law in the landmark *Muscat Dhows Case* and its effect on registration.¹ The discussion will then progress to a comparative analysis on the characteristic features of the principal type of registers (national, open and hybrid) and an in depth examination of foreign ownership or control. Although there

¹ *Muscat Dhows case*, 1916, Permanent Court of Arbitration at The Hague, Hague Court Reports

were previously clear distinctions between the different types of registers, as the industry adapts to the changing global environment, these distinctions are less clear.

Since the historical background and the contemporary issues are outlined in Chapters Two and Three, crucially Chapter Four will offer insights into the future of ship registration.

1.4 Analysis and Conclusion

To achieve the objective, the analysis portion of this dissertation follows appropriately from the comparison of ship registers in Chapter Three. The contemporary topics of security, safety, crewing, taxes, the overall registration process and information technology and will be looked at to provide insight into the future of ship registration.

1.5 Limitations

This dissertation explores the subject of ship registration within the above context in terms of breath. The greater breath is meant for understanding of the overarching nature of ship registration. As such, the breath of this dissertation does not allow for exploration of some issues in depth. The bareboat charter registration, a subdivision of open and international registers is not addressed for this reason. The law of ship registration, the comparison of ship registers, and the future of the ship registration form the general scope of this research.

CHAPTER II: THE LAW OF SHIP REGISTRATION

2.1 KEY LEGAL CONCEPTS OF SHIP REGISTRATION

2.1.1 Nationality

A universal tenet of maritime law is the cardinal importance of the law of the flag. Under international law, each state may determine for itself the conditions through which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.¹ This principle is elaborated in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), article 91:

- 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*
- 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.*

The leading case on nationality is *The Virginius*, which was seized in 1873 by the Spanish when en route to Cuba carrying arms for insurgents.² The United States President Grant took the position that that "if the ship's papers were irregular or fraudulent, the crime was committed against the American laws and only its tribunals were competent to decide the question". This position was successfully maintained and the case established that the regularity and validity of registration

¹ Higgins, AP & Colombos, CJ 1951, *Higgins and Colombos on the International Law of the Sea*, Longmans, Green & Co. Ltd, London, 201.

² *The Virginius* (1906) 2 Moore, Digest of International Law 895-903, 980-83.

can be questioned only by the registering state.³ The ship was restored to the US. Thus, the terms of nationality are in the hands of the particular State. An additional nationality requirement of the two conventions is a ‘genuine link’ between the State and the ship. This is an important point which will be examined later in chapter 3.

A ship without a nationality does not enjoy protection according to international law and has no right to navigate freely on the high seas.⁴ Nationality then provides the ship with a particular State’s protection, especially on the high seas where no sovereign powers exist outside of each vessel. A ship without nationality would exist in a legal vacuum on the high seas and create complications of jurisdiction and laws.

In the past, a number of factors have been proposed as the appropriate test of a vessel’s nationality. A ship’s nationality could be defined solely in terms of ownership as in the *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co. Ltd case*.⁵ Alternatively, it could be defined in terms of where it was built, as the French *Acte de Navigation* of 1793 required every French ship to be French built. The shipowner’s nationality is frequently proposed as a factor for determining a vessel’s nationality. For example, the Danish Merchant Shipping Act simply states, “in order for a ship to be considered as Danish and fly Danish flag, the owner of the ship shall be Danish”.⁶ The Act contains provisions for what it means to be ‘Danish’, which is not limited simply to Danish citizenship but includes EU

³ Ibid.

⁴ This principle was established in *Naim-Molvan v. Attorney-General of Palestine* (1948) A.C. 351 and *United States v. Marino-Garcia* (1982) 679 F.2d 1373. U.S. Court of Appeals, 11th Cir.

⁵ *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co. Ltd* (1883)10 Q.B.D. 521.

⁶ Consolidated Act no. 856 of 1 July 2010, Section 1(1). Additionally, Section 1(2) (a-g) sets conditions for ships not considered Danish but covered by the European Community rules for which the Minister ‘may lay down conditions for registration as a Danish ship’.

nationals and Danish registered companies that may be foreign owned or controlled. Ultimately, it is up to each state to stipulate the conditions for nationality. Though there are many factors involved, the international maritime community reflects that the only universally applicable test of nationality is a vessel's registration or, in a few cases, documentation without registration as in the case of *R v. Bolden and Dean*.⁷

2.1.2 Flag

Nationality is evidenced to the world by the ship's papers (documentation) and its flag. The flying of the flag then is the visible evidence of nationality.⁸ A ship that has fulfilled the conditions required for obtaining a particular nationality is also granted the right to fly the flag of that State. This principle has been established in article 5(1) of the 1958 Geneva Convention on the High Seas (High Seas Convention):

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly...

This principle was repeated in the convention that superseded it, UNCLOS 1982 in article 91, which was quoted above.

State responsibility towards a vessel is represented by the national flag. Thus, a ship flying two flags is considered to be devoid of the protection of both nationalities that it claims. This is according to article 6(2) of the High Seas Convention and article 92 (2) of UNCLOS which has identical wording:

⁷ *R v. Bolden and Dean (The Battlestar) (1997) 2 Int. M.L.* ; Coles, R & Watt, E 2009, *Ship Registration: Law and Practice*, Informa, London, Section 1.13

⁸ Ready, NP 1998, *Ship Registration*, LLP Reference Publishing, London, p. 6

A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality

2.1.3 Registration

Registration refers to the entering of facts into formal public records, and every flag State has a duty to keep a register of all ships flying its flag.⁹ States have discretion to determine the conditions of registration. After registration, the vessel is subject to the jurisdiction of the State and it then assumes national and international responsibilities concerning the vessel.

The registration is also *prima facie* evidence of the owner's title to the vessel and the recognition and protection of the owner's rights *in rem* with regards to the ship.¹⁰ Other benefits of registration include being able to name the vessel, to apply for a radio call sign, and to limit liability in case of a marine disaster.

2.1.4 Documentation

Documentation is the issuance, by the competent authorities of a State, of documents evidencing a vessel's nationality and attesting to her right to fly the national flag of that State.¹¹ Each flag State has a duty to produce documentation as proof of a ship having the right to fly the State flag.¹² This principle was affirmed in *The Merritt Case* in which the U.S. Supreme Court stated, "Documents a vessel carries furnish

⁹ Ibid.

¹⁰ *Reg v Bjornsen* (1865) 12 TR 473

¹¹ Supra note 7 at Section 1.14

¹² *The Geneva Convention on the High Seas 1958* Article 5(2)a and UNCLOS article 91(2).

the only evidence of her nationality.”¹³ Documentation is the only allowed and internationally accepted evidence of the right to fly a flag. Without documentation, there is no recognition of the national character of a ship on the high seas or in a port State.¹⁴ Therefore, a ship without documentation to prove its nationality may be refused authorization to enter foreign ports and engage in commercial activities.

Two categories of documentation are widely adopted. The first is a *Certificate of Registry* as evidence of the ownership and nationality of a vessel. This is generally issued only once, upon first registration of a vessel with a particular flag State. The next is a *Transcript of Registry*, a public document that shows the registered owner and any registered encumbrances against the ship.¹⁵ It is good advice then to investigate both documents prior to acquisition of a vessel to ensure proper title and that the vessel is free of impediments.

Although registration and documentation generally go together, this is not always the case and the two concepts are not the same. Registration involves the public recognition and protection of the shipowner’s title to the vessel as well as the conferment of nationality on the ship. Documentation is the granting and evidencing the entitlement of the shipowner to fly the national flag.¹⁶ The distinction was confirmed in the case of *The Angel Bell* in which the vessel was provisionally registered but the issuance of documentation was not perfected at the time of her loss and, since the mortgage had not be registered, this created problems for the

¹³ *The Merritt* (1873) 84 U.S. 582, p. 586.

¹⁴ *Supra* note 7 at Section 1.17

¹⁵ *Ibid*

¹⁶ *Supra* note 8

creditors and required tedious litigation to allow them to collect from the mortgagees.¹⁷

From these key legal concepts of nationality, flag, registration and documentation, the applicable attributes of ship registration can be drawn. This next section is aimed at helping the reader to understand the legal implications of vessel registration by examining the public and private law attributes of registration.

2.2 THE LEGAL PURPOSE OF SHIP REGISTRATION

2.2.1 Introduction

Maritime transport and trade, fisheries, and general sea use are vital to a nation's economic livelihood. This provides sufficient impetus for control of the various aspects of shipping through the process of ship registration.

2.2.2 Public Law Attributes

Public law is about State issues, whether by itself or in relation to individuals.¹⁸ The public law attributes of ship registration confer certain responsibilities and obligations on State authorities. They also convey a duty of compliance by the shipowner in accordance with the laws and regulations of the State while they bestow rights to engage in particular activities. Some of the different public law

¹⁷ *The Angel Bell* (1979) 2 Lloyd's Rep. 491.

¹⁸ 'Public law', *The American Heritage Dictionary of the English Language*, 2009, Houghton Mifflin Company, Boston.

attributes of ship registration include jurisdiction, state obligations, and ship responsibilities.

2.2.2.1 Jurisdiction and State Obligations

The *Lotus Case*¹⁹ established the principle that a ship, which has been registered in a State, is subject to the legislative and enforcement jurisdiction of that State. State obligations that follow registration include:

- 1 Vessel allocation to a particular State and subjected to the single jurisdiction of that State for matters including crewing, safety regulations, and on board discipline;
- 2 The right to fly the flag of the State;
- 3 The right to consular assistance and diplomatic protection from the State;
- 4 The right to naval protection by the flag State;
- 5 The right to engage in certain activities within the territorial waters of the flag State including cabotage and coastal fishing;
- 6 The determination of applicable rules of war and neutrality of vessels in case of war.²⁰

UNCLOS, Article 94 further details the “Duties of the Flag State”, in particular, “Every state shall”:

- 1 Maintain a register of ships
- 2 Assume jurisdiction through its internal law over ships flying its flag
- 3 Take measures to ensure safety at sea for ships flying its flag (seaworthiness, crewing, training, etc.)

¹⁹ *The Lotus* (1928) P. C. I. J., Series A, No. 10.

²⁰ *Supra* note 8

- 4 Ensure surveys by a qualified surveyor of ship, a master and officers with appropriate qualification, and that crew observes the applicable international regulations
- 5 Conformity to generally accepted international regulations, procedures and practices
- 6 Investigations and inquiries as appropriate regarding 3, 4 and 5, and actions necessary to remedy the situation.
- 7 Inquiry into every marine casualty or incident involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to others.²¹

In practice, these requirements are satisfied by regular inspections and certificate renewal by the flag State's maritime entities to ensure that vessels meet the required conditions and minimum standards set out in international law.²²

2.2.2.2 Jurisdiction and Ship Responsibilities

The law and regulations of the flag State become applicable law with respect to the vessel as soon as the ship is registered. The flag State then has penal jurisdiction in matters of collision or any other incident of navigation.²³ The shipowner(s) and crew are obliged to pay taxes according to the State law and tax rate. The laws of the State also determine the rules and collective agreements on issues of employment, working conditions, salaries, etc. Registration in some case may also entail a right to vote in State elections and to fish in territorial waters on a commercial scale.²⁴

²¹ UNCLOS, Article 94 (1-7).

²² UNCLOS, Article 217

²³ UNCLOS, Article 97

²⁴ Parliamentary Election Act of Denmark, Section 58 (1)

2.2.3 Private Law Attributes

Private law is the branch of law that governs the legal rights and relationships of private individuals, companies, and organizations.²⁵ If public law sees the ship as a floating community carrying the sovereignty of the flag State, private law sees the ship as chattel, an item of moveable property over which persons may have rights worthy of protection under the law.²⁶

Among the private law attributes of ship registration are:

- 1 Protection of title for the registered owner,
- 2 Protection of title for persons with securities, and,
- 3 Protection for third parties

2.2.3.1 Protection of title for the registered owner

As stated earlier in this chapter, registration is not substantive law but *prima facie* evidence of ownership. Although it is strong evidence, registration can never be considered actual proof of title. This principle is reflected in *The Bineta* Case regarding the sale of a registered yacht.²⁷

However, this principal rule is not without exception. When ownership is transferred, the beneficial owner of the vessel (the “legal person” who has acquired title and registered) will gain protection against the transferor’s creditors. As in the *Vostock Shipping Co Ltd v Confederation Ltd* case where an action *in rem* against

²⁵ ‘Private law’, *The American Heritage Dictionary of the English Language*, 2009, Houghton Mifflin Company, Boston.

²⁶ *Hooper v. Gumm* 1(1867) L.R. 2 Ch. App. 282 (Turner L.J.).

²⁷ *The Bineta* (1966) 2 Lloyd’s Rep. 409.

the ship "beneficially owned as respects all the shares therein" should be the same as the "person who would be liable on the claim in an action *in personam*".²⁸ The beneficial owner is given protection from the time he has applied for registration, under the assumption that the application leads to registration. This arrangement protects the new owner from the transferor's creditors. It also results in publicity regarding the acquisition. This is a mandatory rule and has the purpose of informing creditors and other interested third parties of the transaction. It is also applicable in other circumstances such as when the shipowner is being sued or when bankruptcy or arrest of the ship becomes reality.

If it is discovered that the transferor is not entitled to transfer the ship for whatever reason, the transferee is protected if it s/he can show the registration of title was applied for *bona fide*. The *bona fide* acquirer is considered the party with least fault and is generally provided with the most protection.²⁹ Hence the 'good faith' transferee does not bear the burden of blame or fault in illegal vessel transfers and still may be entitled to the ship. Additionally, economic analysis generally favours a generous approach to *bona fide* acquisition as the most efficient solution for the shipping market.³⁰

²⁸ *Vostock Shipping Co Ltd v Confederation Ltd (CA)* (1998) Court of Appeal of New Zealand ca244/98.

²⁹ Salomons, AF 2007, How to draft new rules on the bona fide acquisition of movables for Europe? Some remarks on method and content, *Centre for the Study of European Contract Law Working Paper*, Series No.02, p 2.

³⁰ Lurger, B 2006, 'Political Issues in Property Law' in *The Politics of a European Civil Code*, The Hague, Hague, p 46.

2.2.3.2 Protection of title for persons with securities

A registered ship or shares of a registered ship can be used as security for a loan or other financial consideration. When this loan is registered at the Port of Registry of the ship, it becomes a maritime mortgage, which is a security by agreement established by the creditor over the vessel. In accordance with general principles, this security agreement is in a unique category with features of a possessory lien and a legal mortgage. The ship is a movable property so normally a possessory lien would be attached but it is movable in a special nature so as to allow possession of it to remain with the mortgagee. As such, the maritime mortgage regulations are made in accordance with legal mortgages as though the ship were an immovable object such as real estate.³¹

Registration also has a litigation feature for creditors who seeks to enforce mortgages. Creditors may only bring claims against the persons or corporate entities with registered title of ownership. As claims can only be brought against the registered owner, registration of title also lowers procedural costs.

Registration allows validation of a security through control of the Ship Register. This lowers the risks to the financiers while simultaneously maintaining the owner's legal position. This translates into ease of facility in obtaining loans against security. The holder of the mortgage can apply for registration of possession of the document and through this publicize his or her claim. Registration also provides valuable information for others in the market that are interested in the ship. It is tangible evidence of the creditor's title for his security.

³¹ El-Sayed, HM 1987, 'Maritime Mortgage' in *Maritime regulations in the Kingdom of Saudi Arabia*, Graham & Trotman, London, p. 215

2.2.3.3 Protection for third parties

There are occasions when the owner of a vessel is liable for loss or damage. It is essential in these cases to be able to confirm the owner's identity in order to know who to proceed with legal action against. The register provides an excellent means of identification information to third parties when the owner needs to be found. In court actions, a court may receive in evidence a Register Book or transcript thereof, a Certificate or Registry, or any Declaration made in connection with registry.

Registration is designed to create a safe environment for business and financing. It provides the vessel with the assurance of jurisdiction, nationality and the right to fly the flag of a particular State. With these benefits, the ship also incurs a duty of compliance in accordance with the laws and regulations of the flag State as well as any relevant international maritime standards. The flag state assumes of jurisdictional control over the vessel to ensure compliance and obtains a reasonable remuneration for allowing vessels to register under its flag. There is mutual benefit in the system of ship registration and so it continues to flourish in international shipping.

CHAPTER III: COMPARATIVE ANALYSIS OF SHIP REGISTRIES

3.1 BACKGROUND AND HISTORICAL DEVELOPMENT

3.1.1 Historical Background of Ship Registration

Initially, the main form of ship registry was the domestic registry where individuals, families, and businesses registered vessels in the State of their nationality. The most common condition required full ownership of the vessel by a national or qualified person; foreigners did not generally meet the qualifications for registration. This system of registration protected a nation's economic life, national security, and defence.¹ International interaction was not as widespread as it is today and the demand for registration by foreigners was low; there was insufficient international maritime commerce to justify anything other than domestic registration.

However, by the beginning of the twelfth and thirteenth centuries, there was evidence of the need for registration of ships in countries foreign to the shipowner. This change partly stemmed from the emergence of nation states in Europe like Pisa, Genoa and Catalonia, and the resulting inter-State rivalry and wars among the major maritime nations. These wars fueled the practice of 'flags of convenience' (FOCs) as shipowners sought to avoid the pitfalls of association with warring nations and to profit from the situation. A "flag of convenience" is the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions

¹ Garcia-Correa, L 1995, *National Tonnage Registry versus Open Registry*, PhD Thesis, Institute of Maritime Law, University of Southampton

which, for whatever the reasons, are convenient and favorable for the persons registering the vessels.² These FOCs helped the shipowners to protect their business interests.

In the *Lauritzen v. Larsen* case, British ships in the sixteenth century used the Spanish flag to overcome restrictions regarding trade in the West Indies.³ With voyages of exploration, the slave trade, colonization and the resulting rapid expansion in international commercial shipping, States relaxed control of their merchants and shipowners. Capitalism was now international, so shipping and ship registration adjusted to accommodate the change.

In the seventeenth century, British ships also used the French flag on fishing vessels from Newfoundland to avoid British restrictions. Then in the eighteenth century, the practice of changing to FOCs was widely used in maritime trade in the East Mediterranean.⁴ In France, regardless of the shipowners' nationality, ships carrying goods for French interest sailed under the French flag. As a result, the French increased their taxes and other fees, and many shipowners then switched and registered their ships under Austria's flag.⁵

During the second half of the eighteenth century, Greek ships under Ottoman control used the Russian flag. American shipowners registered their ships in Portugal during the 1812 war to avoid British restrictions. During 1830 to 1850, the new

² Boczek, BA 1962, *Flags of Convenience: An International Legal Study*, Harvard University Press, Cambridge., 2

³ *Lauritzen v. Larsen* (1953) 345 US 571 (US SC); English shipowners "flagged out" to the Spanish flag in the 16th century to beat the Spanish monopoly restrictions on trade with the West Indies

⁴ Llácer, FJM 2003, Open registers: past, present and future, *Marine Policy*, vol 27, 6, pp.513.

⁵ Metaxas, B 1985, *Flag of convenience: a study of internationalisation*, Gower Press, Aldershot.

independent South American republics and their North American neighbours registered their ships under other flags to overcome British control over the States signatory to the eradication of slave trading treaties.⁶

In the 19th century, Genoese shipowners used the British flag when they called at the Gulf of Corinth to counteract the French supremacy of that area.⁷ These shipowners adopted registration under foreign flags to overcome obstacles or restrictions of a political or economic nature that affected their own State. Irish shipowners used the French flag and, in the middle of the nineteenth century, English shipowners began to use the Norwegian flag for commercial fishing vessels.⁸ Obviously then, FOCs have been used historically by shipowners for a variety of ‘convenient’ purposes usually economic, political, or security related.

3.1.2 20th Century Developments

By the beginning of the 20th century, registering ships under foreign flags was a well-established practice. International jurisprudence permitted each State to set the requirements for ships to enter its register. In 1905, this principle was internationally recognized as legal in the landmark ruling by the Hague Court of Permanent Arbitration in the *Muscat Dhows* Case that “generally speaking it belongs to every sovereign to decide whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”⁹ The Court permitted the sailing dhows of the Sultan of Muscat to fly the French flag even though Muscat was a British protectorate. The

⁶ Ibid, p. 514

⁷ Kremmydas, V 1972, *The Emporium of Peloponnesus during the 18th Century*, French Arc, Athens.

⁸ Supra, note 5.

⁹ *Muscat Dhows Case*, 1916, Permanent Court of Arbitration at The Hague, Hague Court Reports 93

Court also stated that “the flag and the register of a ship certify her nationality”.¹⁰ This established a link between the State and the ship, regardless of the shipowner’s nationality. In so doing, the Court declined to associate vessel nationality in any way to vessel ownership. This principle was upheld by the United States Supreme Court in *Lauritzen v. Larsen* Case.¹¹ The *Muscat Dhows* and *Lauritzen v. Larsen* decisions are also held as strong authority for the proposition that any State, including landlocked nations, may establish conditions for the registration of ships since it is the flag and register which certify a ship’s nationality.¹²

The rapid expansion of open and international registers however is a twentieth-century phenomenon. In 1916, Panama started its foreign open ship register, which allowed the registration of Panamanian companies owned by foreigners.¹³ Its growth began in August 1919 when a small cargo vessel, the *Belen Quezada*, was transferred to the Panamanian flag and engaged in rum running to avoid American prohibition laws.¹⁴ Others quickly followed suit as prohibition regulations prevented the sale of liquor on board American vessels. In 1925, Panama enacted liberal maritime laws intended to attract foreign tonnage specifically American shipowners. US shipowners had many incentives to transfer to the Panama registry including the Canal Zone being under US dominion, the use of the US dollar, and Panama’s geographically convenient location. They could also avoid laws that had raised

¹⁰ Ibid.

¹¹ *Lauritzen v. Larsen*, 1953, 345 US 571, US SC.

¹² Anderson, HE III, 1996, The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives, *Tulane Maritime Law Journal* vol. 21, pp.139-170

¹³ Code of Commerce, 22 August 1916 and Law 63/1917.

¹⁴ Carlisle, R 1981, *Sovereignty for sale*, Naval Press, Annapolis.

labour costs in the US and profit from a treaty between the US and Panama, which exempted shipping profits from taxation.¹⁵

In the 1930s, the deteriorating political situation in Europe provided considerable impetus for switching to open registers and many European vessels transferred to the Panamanian flag. Greek owners reflagged their ships in Panama to avoid high crewing costs and the non-intervention blockade imposed by Great Britain and others. With the outbreak of World War II, the Panamanian flag experienced continued expansion as US vessels sought to avoid the requirements of neutrality. Neutrality prevented the carriage of goods to either side involved in the World Wars. The Panamanian flag allowed American shipowners to bypass this provision.

However, post World War II, the uncertainty regarding Panama's political stability and dissatisfaction with its high consular fees led to the development of an offshore shipping register in Liberia under the guidance of the Former US Secretary of State, Edward R. Stettinius, Jr. With the drafting of the Liberian Maritime Law in 1948, Liberia also became an open register State with its ship register based in New York making it an attractive US option.

From the 1950s onwards, more open registers were setup and some 'traditional' maritime States also created 'second registers' and 'international registers' which have more beneficial environments for shipowners than the national registers.

3.2 NATIONAL REGISTERS

In this chapter, the term national register signifies the ability of a shipowner to register a vessel in a particular flag State with nationality as a determining factor for his qualification or entitlement to do so. The main characteristics of national registers are developed below.

¹⁵ Ibid.

3.2.1 Definition/Features

The characteristics of what defines a national ship register are not uniform, since the features vary with each nation State's ship registration requirements.

3.2.1.1 Nationality requirement

Some national registries, will only allow citizens to be registered owners of a ship under its flag. A more open jurisdiction of the national registry type will allow a permanent resident or other similarly statured persons, who may not necessarily be citizens, to become registered shipowners. In the case of corporate shipowners, the usual requirement is that the entity must be a corporate body incorporated under the laws of the flag State and must have its principal place of business in the flag State.

In strict national registers, the laws requires that all involved individuals such as the masters, officers, shareholders, and beneficial owners of the corporations be nationals or citizens of the flag State; or, that citizens or nationals hold the majority of the company's shares. In addition, the flag State may require that the ship be built in a national shipyard, that national authorities issue certificates and licences of all officers and ratings, and that the ship is classed by the national or other recognized classification society.¹⁶ Since the essential feature of national register flag States is that they allow registration only of 'nationals'; this begs the question, 'who then is this national? As previously stated, the requirements of national registers vary. The United Kingdom is one of the oldest traditional maritime flag States and is listed among the top twenty ship registers in terms of tonnage.¹⁷ It ranks in the middle group of aggregate total loss rate or accident rates, its middle ranking and overall

¹⁶ P.K.Mukherjee, *The Changing Face of the Flag State: Experience With Alternative Registries*, 1993, WMU, Malmö, Sweden

¹⁷ *Statistical Survey 2007*, Lloyd's Register – Fairplay Ltd, London, p.12

continued success makes it a good candidate for the author to explore a typical national register.¹⁸ The UK national register will then be used below as an example of national registers in general. It should be noted that some argue that the UK register is actually a hybrid registry because of the extent of foreign ownership or control that is possible in it.¹⁹ However, the historical register of the UK's 'red ensign' is indeed a national registry but through various mediums and legal lacunae, national registers in general may be more open than has been customarily recognized.

3.2.2 The United Kingdom: National Registry

The provisions of the Merchant Shipping Act of 1995 and the Merchant Shipping (Registration of Ships) Regulations of 1993 govern registration of vessels in the UK Registry.²⁰ The Registry is divided into four parts. Part One relates to merchant vessels and pleasure vessels. Part Two relates to fishing vessels. Part Three is the UK Small Ships Registry and Part Four is for the registration of bareboat charters (of foreign registered ships).

In the UK Merchant Shipping Act of 1995, Article 9 on Registration of ships, the basic provisions which are required to register a ship on Part I or IV of the UK ship's register, states:

(1) A ship is entitled to be registered if—

¹⁸ Li KX & Wonham, J 1999, Who is safe and who is at risk: a study of 20-year-record on accident total loss in different flags, *Marit. Pol. Mgmt*, vol 26, no 2, pp. 142-143

¹⁹ Balyk, L 2006, *Crewing of ships in contemporary ship registry systems: safety and socio-economic considerations*. MSc Dissertation, World Maritime University.

²⁰ *Statutory Instrument 3138 of 1993*, The Merchant Shipping (Registration of Ships), amended by SI 1999/3206

(a) it is owned, to the prescribed extent, by persons qualified to own British ships; and

(b) such other conditions are satisfied as are prescribed under subsection (2)(b) below; (and any application for registration is duly made).

(2) It shall be for registration regulations—

(a) to determine the persons who are qualified to be owners of British ships, or British ships of any class or description, and to prescribe the extent of the ownership required for compliance with subsection (1)(a) above;

(b) to prescribe other requirements designed to secure that, taken in conjunction with the requisite ownership, only ships having a British connection are registered.

From this article, ships registered in the UK national registry are ‘owned to the prescribed extent, by persons qualified to own’ UK ships who meet ‘other requirements’ to ensure ‘only ships having a British connection are registered’. So who are the ‘persons qualified to own’ UK ships? This is noted in Part III of the UK Merchant Shipping Regulations of 1993 which state:²¹

7. (1) The following persons are qualified to be the owners of ships which are registered on Part I of the Register:

(a) (i) British citizens; or

(ii) non-United Kingdom nationals exercising their right of freedom of movement of workers or rights of establishment

(b) British overseas territories citizens;

(c) British Overseas citizens;

²¹ As amended by *Statutory Instrument 3206 of 1999*, The Merchant Shipping (Registration of Ships)

(d) persons who under the British Nationality Act 1981 are British subjects;

(e) persons who under the Hong Kong (British Nationality) Order 1986 are British Nationals (Overseas);

(f) bodies corporate incorporated in an EEA State;

(g) bodies corporate incorporated in any relevant British possession and having their principal place of business in the United Kingdom or in any such possession; and

(h) European Economic Interest Groupings being groupings formed in pursuance of Article 1 of Council Regulation (EEC) No. 2137/85 and registered in the United Kingdom

Additionally, persons who are not qualified under paragraph (1) to be the owners of ships registered in Part One of the register may nevertheless be one of the owners of such a ship if majority interest in the ship, defined within the meaning of regulation eight (8), is owned by qualified persons as defined in paragraph (1).

The categories of persons who are qualified to be owners of UK ships then is very inclusive and extends from UK citizens to nationals of the European Union (EU) and EEA citizens exercising their right of freedom of movement as workers and their right of establishment in the United Kingdom as well as owners of UK companies. (At present, the EU includes twenty-seven member states and has four candidate countries with 5 potential candidate countries. The E.E.A includes the EU, Norway, Iceland and Liechtenstein.)

3.2.2.1 Corporate Ownership in National Registers

To incorporate a shipowning company in the UK in order to register vessels, one direct route is to establish a limited liability company registered in England and

Wales, or in Scotland, under the Companies Act of 2006 or in Northern Ireland under the equivalent Northern Ireland legislation. ‘Shelf companies’ can be acquired from company registration agents. Shelf companies are ready made companies and can be used the moment they are purchased. They normally have an authorized capital of with standard memorandum and articles of Association. The names can be changed, articles amended or the authorized capital increased at any time. Alternatively, companies can be incorporated to specification in England and Wales or Scotland under certain conditions and upon payment of an expedition fee.²² The conditions include:

1. **Non-resident status:** All companies that are incorporated in the United Kingdom are considered resident for tax purposes. There exists no distinction between a resident and non-resident company.
2. **Registered office:** The memorandum of association for companies’ must specify whether the registered office is in England and Wales, Scotland, or Northern Ireland. It is a standard practice for companies registered offices to be at the offices of companies’ lawyers or accountants, etc.
3. **Shareholders:** Company may have one or more shareholders. The nationality or residence of the shareholders is irrelevant.
4. **Directors:** Private limited companies may have one or more directors. Their nationality or residence is irrelevant.
5. **Secretary:** Private companies are no longer required to have company secretaries but many private companies continue to have one. Public company must appoint company secretaries.
6. **Returns:** Annual returns must be filed with the registrar of companies. These include the names and addresses of the shareholders, directors, and

²² Coles, R & Watt, E 2009, *Ship Registration: Law and Practice*, Informa, London, Section 25.6

company secretaries. Other documents as required time to time must also be filed at Companies House are available to the public.

7. **Auditors and accounts:** Private companies have the option dispense with the obligation to appoint auditors annually through an elective resolution. Otherwise, auditors are appointed at the annual general meeting and companies are required to file accounts at Companies House.²³

Therefore, with minimal disruption and business formality, foreign corporations or persons can apply for incorporation in the UK online and the formation of a limited company usually takes as little as four to six hours from the time of the application and payment.²⁴ The law firm or registration agent handling the incorporation can provide the additional services required to meet incorporation conditions including a registered office address and a nominee secretary all included in the price of the incorporation package and for an annual fee.²⁵

The ease of formation of limited liability companies is not unique to the UK and is a feature of many national registers. The incorporation of a company in Denmark for instance, can be done online and usually takes one day from the time of the application. The law firm handling the incorporation can offer a registered office address in Denmark and help to meet all the requirements of incorporation.²⁶

²³ Ibid, Section 25.7-25.13

²⁴ Coddan CPM Ltd, *Coddan Companies Formation Worldwide*, viewed 2 August 2010 <<http://www.ukincorp.co.uk/s-6-uk-company-formation-law.html#2> >

²⁵ Ibid.

²⁶ Ministry of Foreign Affairs Denmark, *News Page*, viewed 29 August 2010 <<http://www.investindk.com/visNyhed.asp?artikelID=10640>>

3.2.3 Convenience

The element of convenience is also not the exclusive domain of the open registry flags. National registries often take advantage of government subsidies or other incentives to the shipping sector including the State's naval protection for reasons of commercial expediency. A prime example that Coles & Watt cite is the transfer of ships to the UK and United States flags during the Iran-Iraq conflict in 1980 to 1988 as a way for shipowners to take advantage of the naval protection afforded by those States in the Persian Gulf.²⁷

3.3.2 Conclusion: National Register Analysis

Conditions vary somewhat between national registers but the feature of foreign control, if not foreign ownership, is not unique to open registers and is present in many national registers. The term "flag of convenience" which is widely used in the shipping industry almost exclusively in association with open registers, can sometimes just as easily be applied to competitive national registers like the UK.²⁸ In the UK case, some even argue it is a hybrid register because of the extent of foreign ownership or control within the register but the UK is an established national register.²⁹ The UK example demonstrates that although the national ship registers are closed, the company registers are wide open with few legal formalities.³⁰ Shipowning companies only need to be incorporated in the country and have their principal place of business there. In some national registers, a certain percentage of the shareholders of a company are required to be citizens but in others, there is no

²⁷ Supra note 23, Section 3.3

²⁸ Supra note 2, p. 2.

²⁹ Supra note 20.

³⁰ Donner, Patrick 2010 (Personal communication), August.

such requirement. Thus, the beneficial owners of national ships may be foreign nationals. This feature was already present before the formation of the EU Treaty and is now even more prominent after. This happens as no discrimination is allowed across EU countries so even more national registers today have foreign nationals as beneficial owners of national ships.

3.3 OPEN REGISTRIES

The author will categorize open registers in terms of the ability of a shipowner to register a vessel in a particular flag State without his own nationality being a determining factor of his qualification or entitlement to do so. These flag States permit registration for reasons of commercial expediency.

3.3.1 Definition/Features

The author characterizes the features of open registers as follows:

3.3.1.1 Low taxes

In open registries, there are often zero-tax incentives since foreign nationals (non residents) are allowed ownerships of flag State vessels. The main source of revenue for the open register flag States then is not in collecting income tax but in collecting annual ship registry fees. The shipowners pay registration fees and annual fees or taxes based on vessel tonnage for the period that the vessel is entered in the open register. In some cases, shipowners may also request and be granted guarantees for tax exemption status or for future tax relief if they provide several vessels in the register or other consideration that compensates for the register's loss of fee income.

3.3.1.2 Lower Crewing Costs

Another characteristic of the open registry is that crewing of ships by foreign nationals is allowed. Registration in an open register generally means an unrestricted choice of crew in the international market. It also means that the shipowner is not subject to national wage scales or salary conditions and can then negotiate lower crew costs.

The lower crewing costs feature is what led to organized labour's opposition to open registers under the "flags of convenience" banner. Beginning in the US and gathering momentum in 1948, the ITF began its campaign against FOCs, primarily focused on open registers. The ITF has a membership of 650 trade unions in 140 countries and resolved to boycott open registry ships.³¹ Although the ITF's opposition to FOCs and specifically the open registry system is directed against substandard labour conditions on board vessels, the original aim was to prevent loss of jobs for seafarers in the traditional European maritime countries where the high crew wages made shipping a less viable economic option. ITF has classified as 'flags of convenience' any country that allows on its register ships that are beneficially owned or controlled by companies incorporated elsewhere. It publishes a FOC country list and a blacklist of shipowners who are considered to have violated seafarers' rights and as such are specifically targeted for industrial action at ports. The FOC categorization used by ITF mainly applies to open registers and a few international and hybrid registers. National registers that provide the same FOC facilitation are not included on the list of FOCs but rather individual vessels are listed.

³¹ International Transport Workers' Federation, *International Transport Workers' Federation Home Page*, viewed 22 August 2010 <<http://www.itfglobal.org/index.cfm>>.

The following 32 countries have been declared FOCs by the ITF's Fair Practices Committee (a joint committee of ITF seafarers' and dock workers' unions): ³²	
Antigua and Barbuda	Honduras
Bahamas	Jamaica
Barbados	Lebanon
Belize	Liberia
Bermuda (UK)	Malta
Bolivia	Marshall Islands (USA)
Burma	Mauritius
Cambodia	Mongolia
Cayman Islands	Netherlands Antilles
Comoros	North Korea
Cyprus	Panama
Equatorial Guinea	Sao Tome and Príncipe
French International Ship Register	St Vincent
German International Ship Register	Sri Lanka
Georgia	Tonga
Gibraltar (UK)	Vanuatu

3.3.1.3 Less regulatory control and relative anonymity

Although this factor is diminishing in importance, another characteristic of open registers is that the shipowners may have less regulatory controls exercised over them and more anonymity. Some States with open registries lack either the political will or administrative competence to effectively enforce and impose national requirements or international maritime laws and standards. In some flag States, the

³² Ibid, viewed 4 August 2010

shipowning company's capital can be disguised due to minimal public filing requirements; the directors, managers and others can be nominated and have little input in the company or ship's operation. This anonymity is possible because the capital of the shipowning companies in certain jurisdictions is generally presented in bearer shares which make determining the beneficial ownership of the vessel nearly impossible. However, international anti money laundering regulations are diminishing this condition and registers require clearer identification of beneficial owners. Being virtually invisible may favour the shipowner but at cost to safety and security, a price open register States are increasingly reluctant to pay.

3.3.1.4 Safety Characteristics

The wider shipping community is concerned about the safety implications of registers without any substantive national attachment between shipowner and flag State. The concerns are in regards to the lack of regulatory supervision by flag States that can create an environment of international insecurity that is vulnerable to incidents of maritime terrorism.³³

A 1981 report by the UNCTAD identified ten reasons why non observance of safety standards is likely to be greater under open-registry flags than under national flag States:

- i. Real owners are not readily identifiable;
- ii. Real owners can change their identities and avoid being labelled as repeat sub-standard operators;

³³ Gianni, M 2008, *Real and Present Danger—Flag State failure and Maritime Security and Safety*, International Transport Workers' Federation & World Wide Fund for Nature publication, Oslo/London.

- iii. Since the master and other key personnel are not nationals of the flag state, they do not have to visit the flag State and can avoid legal action;
- iv. Owners residing outside the jurisdiction of the flag State can refuse to testify at an inquiry and avoid prosecution;
- v. Open registry owners do not have the same incentive to preserve good relations with the flag State or to co-operate with flag State inspectors;
- vi. Open registry shipping lacks the union structure considered essential to the application of safety and social standards, namely, a national trade union representing the interests of seamen on board vessels;
- vii. Open registry owners are in a position to put more pressure on masters and officers to take risks with less fear of government intervention;
- viii. Port State control can only report sub-standard vessels and practice to a flag State which has no real control over the owner;
- ix. Owners can more easily suppress and change crews.
- x. Enforcement of standards is inconsistent.³⁴

The potent combination of publicity and pollution following any spill results in an assumption of guilt by the operator of an open register vessel, a prejudice not based in objective analysis. In order to counteract the negative safety reputation, open registries have increasingly adopted additional safety requirements such as pre-conditioned surveys before the issuance of the certificate of registry, age limits on ships in the register, and other requirements for compliance with international maritime standards. However, the economic advantages to the open register flag State can be significant even with such additional requirements, especially for

³⁴ United Nations Conference on Trade And Development, Action on the Question of Open Registries, TD/B/C.4/220.

smaller or developing nations that are increasingly involved in providing offshore registration facilities to shipowners.

Open registries, like other registers, contain a wide variety of tonnage, of different ages and construction; some vessels are operated by large multinational corporations, like the major oil companies. Some of the most modern ships are being operated under open registers and the more responsible open register States have taken steps to exclude old and aging tonnage from their register. Panama requires vessels over 20 years of age to undergo a special inspection before the Permanent Certificate of Registry can be issued. Liberia generally requires that vessels seeking registration (or re-registration) are not more than 20 years old and Bahamas generally applies a 12 year age limit.

All the major open registers are parties to the generally accepted international maritime safety conventions and the more responsible registries have a network of worldwide inspectors to ensure compliance. Liberia and Panama even make annual levies on ships in their registers, based on net tonnage, for casualty investigation and international participation. In the December 2007 UNCTAD annual statistical entitled “Review of Maritime Transport”, there were no generally distinguishing conclusions that could be drawn with regards to the comparison of the safety of foreign flagged versus nationally flagged vessels. In other words, there were no significantly distinguishing differences between the safety records of national and open register ships.

3.3.1.5 Economic Characteristics

In the 1981 UNCTAD report, the open register States are held responsible for the increases in Government assistance and tax concessions that traditional European maritime nations like United Kingdom, Greece and Norway considered necessary to compete. There have certainly been many measures put in place to encourage

shipowners back to their traditional national registries: subsidies, tax concessions, and other incentives to the shipping sectors. In the words of the UNCTAD Report:

... there is no doubt that the existence of open registries is the major cause of the distortions that governments have been forced to make to their fiscal regimes... Shipowners in the traditional maritime countries have come to look to their governments automatically for subsidies, whatever the causes of their problems—whether due to low-cost competition, inefficient operations, failure to rationalize, or irresponsible overbuilding.

... the assistance which the traditional maritime countries have given to their shipbuilding industries in trying to compete with one another to obtain orders for newbuildings from the pool of recycled cash-flows of open registry operators... has led to overcapacity not only in shipping, but also in the shipbuilding industry. The surplus of shipping and shipbuilding capacity represents one of the most serious world-wide misallocations of capital investment in recent history.

3.3.2 The development of the concept of genuine link

Another way open registers are defined is by reference to the existence of a genuine link between a vessel and its country of registration.

Although set out in a variety of international documents, the ‘genuine link’ requirement is undefined and remains an ambiguous legal concept that has fuelled much academic and political debate. Some, like McConnell, viewed it as diverting attention from the real issue, the ‘infringement upon the economic sovereignty of the state’.³⁵ Others, like Meyers, hypothesized that genuine link “has been prescribed

³⁵ McConnell, ML 1986, ". . .Darkening Confusion Mounted Upon Darkening Confusion": The Search for the Elusive Genuine Link, *J. Mar. L. & Com.*, 16, pp. 366

for the sole purpose of safeguarding the necessary authority of the flag State in the best possible manner”.³⁶ This section of chapter 3 considers the development of the legal requirement of ‘genuine link’ in relation to open registers and the purpose it serves.

3.3.2.1 *The Nottebohm Case*

In 1951, the country of Liechtenstein sponsored a claim *Liechtenstein v Guatemala* (*The Nottebohm Case*) for the compensation of Mr. Nottebohm, a naturalized citizen of German origin whose property in Guatemala had been seized during WWII. The court decided that nationality did not create obligations beyond the sovereign state’s boundaries. The concept of ‘genuine link’ in international law was extracted from the International Court of Justice’s (ICJ) 1955 decision on what confers nationality:

*...Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.*³⁷

This ‘genuine connection’ idea was used by the Netherlands in a draft article on the nationality of ships in the Yearbook of the International Law Commission.³⁸ The proposed article submission expressed the idea that to establish a ‘genuine connection’ ownership of the vessel and the nationality of its crew or captain would have to be taken into account. This went contrary to established international law which had not previously imposed any obligations on States to require national participation in ownership or crew. In fact, the legal landmark ruling by the Hague Court of Permanent Arbitration in the *Muscat Dhows Case* of 1905 had established

³⁶ Meyers, H 1967, *The Nationality of Ships*, Martinus Nijhoff, The Hague, p.244.

³⁷ *Liechtenstein v Guatemala (The Nottebohm Case)* [1955] ICJ Rep. 4, at 23.

³⁸ *Yearbook of the International Law Commission*, 1956, Vol. II, p. 63

the international principle that every State determined the conditions under which it decided whom to allow fly its flag. The Court had specifically stated that “the flag and the register of a ship certify her nationality”.³⁹ This established a link between the State and the ship, regardless of the nationality of the shipowner or crew. In essence, the Court declined to associate vessel nationality in any way to vessel ownership. This principle was upheld by the United States Supreme Court decision in the *Lauritzen v. Larsen* Case of 1953.⁴⁰

3.3.2.2 1958 Geneva Convention on the High Seas

In the 1958 Geneva Conventions on the High Seas (High Seas Convention), traditional maritime states advocated nationality conditions in accordance with the creation of the ‘genuine link’ requirement. This was opposed by states with open registries, such as Panama and Liberia, supported by the United States. Imposing nationality requirements seemed to be only a means to halt the exodus from the more costly traditional registries to open registries.

The concerns of the traditional maritime states regarding the commercial threat of open registries of emerging maritime states was balanced against the sovereign rights of the States. The ‘genuine link’ concept was accepted in the convention as a compromise between the two concerns. It was included in article 5(1) with the following wording:

... There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.

In *The Nationality of Ships* by Tache, a genuine link based on article 5 of the Geneva Convention is interpreted to mean,

³⁹ Supra note 9

⁴⁰ Supra note 11

...the legal and functional responsibilities assumed by the flag state when it confers national character upon a ship... (or) the method by which legal responsibility is translated into social reality.⁴¹

Tache saw a dichotomy of legal and functional in the meaning of genuine link. Legal in terms of the fact that establishing a genuine link requires only for the flag state to give nationality to the ship; and functional, in terms of the fact that the flag state is to exercise effective jurisdiction over the internal affairs of the ship.⁴²

3.3.2.3 1959 IMCO Advisory Request

In 1959, shortly after the High Seas Convention, the genuine link principle was discussed relation to the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization (IMCO now IMO) case before the International Court of Justice (ICJ). The ICJ was asked to give an advisory opinion on the meaning of article 28A of the convention establishing IMCO. This involved the requirement that the eight largest shipowning nations be elected to the Maritime Safety Committee. There was some dispute regarding whether open registry states were eligible depending on the meaning of “ownership” and the court was asked to apply the ‘genuine link’ test as set out in *Nottebohm*. The Court responded:

Neither the nationality of the stockholders or the shipping companies nor the notion of genuine link is the relevant test for determining shipowning

⁴¹ Tache, 1982, *The Nationality of Ships: The Definitional Controversy and Enforcement of the Genuine Link*, *International Lawyer*, vol. 16, pp.301-312. 306

⁴² *Ibid* at p. 305

*nations...the test of registered tonnage is that which is most consonant with international practice and maritime usage.*⁴³

This decision has been variously interpreted ranging from the Court abstaining to consider arguments relating to open registries to registration being the only accepted test of nationality.⁴⁴

3.3.2.4 The 1982 Convention on the Law of the Sea

Article 91 of the 1982 convention reiterated the first half of the 1958 Convention article 5(1), the ‘genuine link’ requirement, but also expanded the second half of article 5(1) that details the duties of flag states. Flag state obligations were significantly increased; however, the issues of the ties of registration and ‘genuine link’ were not clarified. Provisions such as article 92 (*A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry*) reflect the ambiguity. This article considered the option of vessels changing registries, which implies that the ‘genuine link’ can be formed and reformed with another registry. The ability to establish multiple genuine links reinforces the idea that genuine link is established between the ship and the State and each State chooses its own conditions for nationality.

3.3.2.5 The 1986 UNCTAD Convention

In 1974, the United Nations Conference on Trade and Development (UNCTAD) decided to investigate the concept of ‘genuine link’ and the consequences of a lack of genuine economic link between the flag state and the vessel. It stated that not only

⁴³ Constitution of the Inter-governmental Maritime Consultative Organization [1960] ICJ Rep. 150

⁴⁴ Supra note 35 at p. 376

was there a need for ‘genuine link’ but that open registry fleets did not meet this criterion and used this argument as a method for promoting the proposals of UNCTAD.⁴⁵ These proposals essentially included economic preconditions for registration. UNCTAD argued that effective control was only possible when an economic link exists between the vessel and the state.⁴⁶ It followed then that if the ‘genuine link’ carried a functional or control aspect, it needed to be defined in economic terms.

While there are many controversies that sprang from the views expressed, the basic thesis was not refuted. The open registry system of the emerging maritime states is seen as a mechanism for continued economic opportunism by developed countries. “The practice is seen as a convenient method for the developed market economies to make use of the developing states’ resources while retaining control and benefit of the wealth generated (from international shipping)”.⁴⁷

Professor Lawrence Juda points out that UNCTAD’s economic arguments failed to address the core issue of equitable distribution of resources. Equity is not a concept of economics but one of politics as it involves the ideas of justice and fundamental fairness.⁴⁸ International shipping trade is fundamentally commercial and the politics surrounding it are commercially influenced. The seas may be *mare liberum* or equal access, but, in the world of international shipping, some countries are ‘more equal’ than others.

⁴⁵ Juda, L 1999, World shipping, UNCTAD, and the New International Economic Order. *International Organisation*, 35, pp. 494

⁴⁶ *UN Conference on Conditions for Registration of Ships*, 1984, U.N. Doc No. TD/RS/Conf/C.1/L.2,1/08/84

⁴⁷ *Supra* note 35 at p. 387

⁴⁸ *Supra* note 45 at p. 505

Unsurprisingly, the UNCTAD arguments met with much criticism especially from the Group B countries that noted that the concept of ‘genuine link’ in article 91 of UNCLOS included no economic requirement for registration and argued instead for increased flag state obligation, with the support of coastal and port state enforcement.⁴⁹ Overall, the Convention cannot be considered to have contributed much to the explanation of the genuine link concept as contained in UNCLOS.⁵⁰ The limited success of the Convention is witnessed by the fact that it was signed by only 14 states and only 14 states have become a party to it.⁵¹

3.3.2.6 What does it do?

Thus far, the legal requirement of ‘genuine link’ introduced in shipping in 1958 remains vague and undefined. The ambiguity of ‘genuine link’ has justified a compromise for traditional maritime states. It balances between a lack of political action against open registries that might imply economic cost to them and international regulation within the UNCLOS provisions that removed some of the economic advantages of open registries and allowed for external enforcement

⁴⁹ United Kingdom on behalf of Group B Countries, 1983, *A Set of Principles Concerning the Conditions upon which Vessels should be accepted in National Registries*, U.N. Doc. No. TD/RS/Conf/PC/3, p. 13,15.

⁵⁰ McConnell, ML 1987, "Business as Usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, *J. Mar. L. & Com*, 18, pp. 449

⁵¹ United Nations, *Multilateral Treaties Deposited with the Secretary General*, viewed 19 August 2010 < http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xii_boo/xii_7> . The Convention enters into force 12 months after the date on which no less than 40 States, the combined tonnage of which is at least 25 per cent of world tonnage, have become a party to it (Registration Convention, article 19).

against open registry fleets (i.e. port state control). Therefore, developed market economies retain the control and benefit of the open registry fleets.

3.3.3 Conclusion: Open Register Analysis

Ship registration developed the open registry system to resolve the rising operating costs, employment costs, and financing requirements of the industry and to increase profitability thereby maintaining and encouraging the growth of the shipping industry.

In the last 20 to 30 yrs, shipping has undergone profound restructuring, characterized by a trend towards globalization and a search for the right combination of input factors to ever increase shipping's efficiency. Shipowners from the traditional maritime nations have increasingly reflagged to open registers mainly in the new maritime countries to take advantage of lower input costs and more economically beneficial environments.

3.4 HYBRID REGISTRIES: A ROSE BY ANOTHER NAME

In the wake of the successful development of open registers, traditional maritime States developed hybrid registries to compete and to support their diminishing maritime fleets. Hybrid registers offer attractive combinations of national and open registry features designed to lure shipowners. Just as open registers developed in response to national registries, so hybrid registers have developed in response to open registries. They are easier to access and have fewer entry requirements than most national registries. They tend to maintain a nationality link between beneficial owner or management of the vessel and the flag State. In general, hybrid registries tend to offer financial incentives and advantages similar to open registers.

In the category of hybrid registers, there are varying degrees of open/national registry combinations, which are variously labeled ‘second’, ‘offshore’, ‘international’ or ‘free association’ registers. Below are the typical characteristics of hybrid registries.

3.4.1 Definition/Features

3.4.1.1 Nationality

Many hybrid registers are maintained for use only by national shipowners as an alternative to flagging out and as a way to compete with the open registry system.

In the 1970s, former UK colonies like Bermuda, Cayman Islands, and Gibraltar became ‘second registers’ of the UK. They could fly the UK ‘red ensign’ flag with the rights and obligations of the British Merchant Shipping Act while offering reduced costs. The hybrid features of the registers have several advantages for shipowners. The administration and control by traditional maritime nations often put second registers in a better position in terms of port state control inspections and detentions due to the good reputation of the flag.

Other traditional maritime States have also set up international registers in former colonies or dependent territories, France in Kerguelen Islands, Portugal in Madeira, Spain in the Canary Islands and the Netherlands in the Netherlands Antilles.⁵² The Marshall Islands Registry operates under an agreement of free association with the United States.

Where the link with the national flag is retained, the jurisdiction of the individual State over vessels owned by its ‘nationals’ is preserved. This has regulatory, fiscal and security benefits for the flag State and may eventually eliminate the need for the

⁵² Li KX & Wonham, J 1999, Registration of Vessels, *The International Journal of Marine and Coastal Law* 14, 1, pp. 151

subsidies and other forms of financial assistance to shipping which have of late become features of maritime policy in developed nations.⁵³

However, some hybrids allow foreign shipowners access to the registry once certain technical standards are met. The Norwegian and Danish International Ship Registers, the Isle of Man, and Madeira permit foreign owned or controlled vessels in certain circumstances while the German and the French International Ship Registers do not have nationality requirements.

3.4.1.2 Crewing of nationals /crew wage agreements

Another typical characteristic of hybrid registries is that crewing of seafarers from foreign countries is freely permitted. The Norwegian International Ship Register, Danish International Ship Register, the Isle of Man, and Madeira make it optional to enter into crew wage agreements acceptable to that country's unions or not. The German and the French International Ship Registers do not contain crewing requirements.

The effect is that the ITF has classified the French and German International Ship Registers as 'flags of convenience'. In the hybrid registers though, ITF does not classify the registers as 'flags of convenience' but classifies ships as 'flags of convenience' ships on an individual basis depending on the beneficial owner/management relationship to the flag and the existence of crewing and wage agreements.

⁵³ Supra note 23 at section 3.40

3.4.1.3 *The Norwegian International Ship Register (NIS)*

The Norwegian Ship Register was aimed at competing with the more successful open registers like Panama and Liberia and has become an international contender in its own right. Prior to the 1980s, over 90% of Norwegian vessels were registered under the Norwegian flag (NOR). By 1987, only 38% of Norwegian vessels were still registered under the flag.⁵⁴ This was despite generous government subsidies to the national shipping industry. High crewing costs and vessel operation under the register were cited as the cause.

The government of Norway responded by establishing the Norwegian International Ship Register (NIS). The register is open to vessels whether Norwegian or foreign-owned as long as they meet the required technical minimum standards. Foreign-owned ships are required to establish or delegate a large part of the vessel's commercial management to a ship management company in Norway. This, of course, benefits the local Norwegian maritime sector. Ships that have regular service to Norway or that transport passengers are not allowed on the NIS register.⁵⁵

In the NIS, Norwegian shipowners are permitted to crew the vessel with foreign nationals for all positions except the master who must be Norwegian unless granted a waiver by the Norwegian Maritime Directorate. There are no strict crew service agreements required. Local crewing legislation applies but may be departed from if collectively agreed upon by the involved parties. In 2007, the NIS had nearly triple

⁵⁴ Kappel, R 1988, *The Norwegian International Ship Register—A New Approach of a Traditional Shipping Nation*, Institute of Shipping Economics and Logistics, Bremen.

⁵⁵ Supra note 23, section 3.43

the tonnage registered under the NOR but over 35% of vessels beneficially owned by Norwegians are still registered externally.⁵⁶

3.4.2 Conclusion: Hybrid Register Analysis

In hybrid registers the subtle difference between “freely permitted” and “optional” can mean the difference between being blacklisted by the ITF as a flag of convenience or not. Hybrid registers allow ships to maintain their affiliation with their national or traditional maritime flag while enjoying the benefits of low operating costs and lower taxes similar to that of an open registry.

3.5 CHAPTER CONCLUSION

Some authors would classify the UK ‘red ensign’ flag as a hybrid register, as its definition of a ‘national’ is broadly interpreted. However, national flag states have been operating in a manner convenient to them from the inception of ship registration. Registration is not merely a means of maintaining statistical information but extends into the realms of economics, security and politics as well. National registers have ships with varying degrees of foreign control or foreign ownership which has been present to varying extents for a long time and is even more prominent today as ship registration becomes more competitive. The notion of the national register is becoming more a matter of legal fiction and, if we eliminated registers from the national list in which any element of foreign ownership or control exists, we may have no national registers left.

In accordance with the global nature of shipping, open registries operate ship registration on a decentralized basis through subcontractors and private class societies. This, however, comes with the potential drawback of low monitoring of

⁵⁶ *World Fleet Statistics 2007, Lloyd’s Register—Fairplay Ltd, London*

vessels within the registry if proper controls are not in place. The shipping community's response has been to develop regulatory networks to regulate the regulators, port state control (PSC). PSC's power is not in enforcement as port States lack direct jurisdiction, but their power lies in the sanction of detention, which is ultimately very costly to a commercial vessel.

Although there is often little difference between hybrid and open registers, the transfer of national ships to open registries with all the associated loss of economic opportunity for the traditional maritime States is unacceptable. Hybrid registers are the 'roses by another name' and allow traditional maritime States to maintain or recapture jurisdiction over national vessels and compete with open registers for foreign tonnage.

CHAPTER IV: THE FUTURE OF SHIP REGISTRATION

4.1 INTRODUCTION

The main tension in shipping is between traditional flag States trying to retain economic power (and control) and non-traditional flag States acquiring power. In the last few decades, the open registry system has had a defining impact on shipping. It has increased international competition to the benefit of shipowners and in turn for international consumers by reducing the cost of shipping operations.

This market competition has been a challenge not only to traditional maritime States, but also for traditional seafarers. They also find themselves in direct competition with seafarers from emerging maritime powers. This competition has had some negative effects on crew safety, onboard ship standards and remuneration. However, while initially detrimental to safety standards, these same competitive forces are also forcing innovation in quality and safety thereby leading to improvements.

The attempt of national register States to use the legal requirement of ‘genuine link’ as a lever to economically disadvantage open register States has not worked. The original aim contradicted existing international laws; and, as an attempt to force States to enact legislation against their own economic interest, it was unrealistic. Even the traditional maritime states who claimed to be damaged by the development of the open registry system have still not become signatories to the High Seas Convention. Bolivia, for instance, which signed the convention, has opened its own open register. Open registers are a part of the ship registration market and, as long as they remain an economically viable option, they will continue to play a major role.

Regardless of the type of registry, there are several aspects of the industry that are likely to undergo significant transformation in the coming years. Registries are moving in the direction of becoming more similar rather than different. The stakes are high and all players will have to build their reputations as that equals being

economically competitive.

The features in industry that will undergo significant modification include:

- i. Security
- ii. Safety Standards
- iii. Crewing
- iv. Taxes
- v. Registration: The Overall Process and Information Technology

4.2 ARGUMENTS

4.2.1 Security

Security was not always a high priority in the shipping industry since the focus was on maximizing profits. IMO's role has mainly been in developing international safety standards. "The international maritime community has historically treated security as a subset of safety and only 'the adoption of the ISPS Code may have elevated security to the status of importance in its own right'".¹ In recent times, there has been a radical rethinking of the scope of security. It is no longer contemplated within the narrow interpretation of a military security apparatus. Governments must also guard against violence in non-traditional categories like food and indeed shipping. The events of September 11, 2001 led to the mandatory incorporation of security in international shipping. The International Convention for

¹ Maximo Q Mejia Jr., Law and Ergonomics in Maritime Security, Doctoral Thesis, Division of Ergonomics and Aerosol Technology, Department of Design Science, Lund University, 2007, p. 50

the *Safety of Life at Sea (SOLAS)* was amended in December 2002 by adopting the *International Ship and Port Security (ISPS) Code*.²

A number of other shipping security initiatives were also developed during that time including the United States Container Security Initiative (CSI) and Customs and Trade Partnership against Terrorism (C-TPAT). The World Customs Organization's (WCO), whose membership includes 99% of world trade partners, developed a *Framework of Standards to Secure and Facilitate Global Trade* in May 2005.³ The framework includes principles for prior electronic reporting of cargo and shipper data and requires importers to verify security measures taken by their suppliers. The main purpose of these initiatives is to reduce the likelihood of shipping being used a vector for terrorism. However indiscriminately applied, they will undoubtedly affect global competition. Some initiatives are mandatory and others voluntary or recommended. Voluntary initiatives while not binding are intended to give competitive advantage (costs are usually lower) to early adopters and in IMO 'soft law' often converts to hard law through customary use in the long term.

It is clear that registers in the future will have to incorporate security measures as part of the basic registration requirement. If security is not addressed at the registration stage, loopholes are likely to remain and there will be a myriad of ways to circumvent transparency regulations. The addition of security requirements are likely to meet with reluctance as it will be seen as complicating the process of registration. However, with the political will of key players, a streamlined process and universal standards can be developed. If the industry does not proactively move towards more robust security practices, it may find itself in the position of being

² International Maritime Organization, *ISPS Code*, IMO Homepage, viewed 11 August 2010 <www.imo.org/safety/mainframe.asp?topic_id=897>

³ World Customs Organization, *Framework of Standards to Secure and Facilitate Global Trade*, viewed 11 August 2010 <wcoomd.or/ie/En/en.html>

forced to do so by governments. Security is everybody's business and the shipping industry cannot afford to be used as a conduit for terrorism or attacks on economic infrastructures.

4.2.2 Safety Standards

In open registers, there was a greater potential for the non-observance of international safety standards. These flag States tended to be unwilling or unable to control and monitor vessels within their fleets. This created the potential for safety standards to be further down on the priority list. This led to the development of Port State Control (PSC) as an additional layer or 'safety net' to the monitoring of ship compliance in terms of international regulations regarding safety at sea.

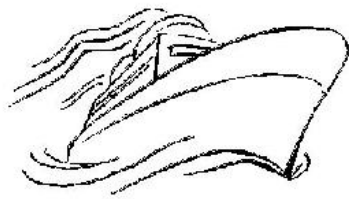
The intervention of PSC is allowed through international maritime conventions like UNCLOS (Articles 25 and 218), the International Convention for the Safety of Life at Sea (SOLAS Regulation 19), the International Convention for the Prevention of Pollution from Ship (MARPOL 73/78 Annex VI), and the International Convention of Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78 Article X and regulation I/4). PSC as an international initiative has the authority to address ship safety, safety of life at sea and environmental pollution issues. Safety standards are inextricably linked to environmental and labour concerns since where one is lacking it has a domino effect on the others. In so doing, PSC operates in the best interest of seafarers (and countries with large seafaring populations) and the environment.

Over time, port States have found ways to consolidate power and increase influence over flag States through regional cooperation such as memoranda of understanding (MOU). These MOU coordinate and streamline inspections which puts pressure on flag States and ships for compliance with international maritime standards. The pressure exerted on flag States however, is not evenly distributed because the motivation behind inspections is more complex than that stated in international

maritime conventions. Initially there was little or no discrimination against owners or flags in PSC regimes in conformity with the Convention on the Conditions for the Registration of Ships.⁴ In 1993 however, this changed and the Paris MOU started targeting specific ships, owners and flags. As a result, open register ships are targeted for inspections more than national register ships. This translates into delays and other economic implications for shipowners or charterers flying open register flags. This can be a disincentive to register under such flags therefore diminishing their competitive advantage.

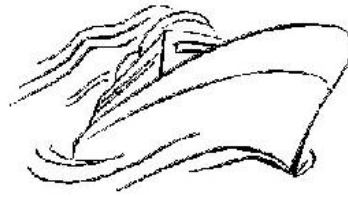
Targeting flags has dire consequences for smaller open registers, potentially eliminating them from the registration market entirely. Consider the hypothetical comparison of two registers, one with 100 ships and one with 20 ships. If PSC targets and inspects ten ships from each register and two of each is detained for safety violations, the 100 ship register has a detention rate of 2% and the 20 ship register develops a detention rate of 10%, which is enough in some cases to get it on regional blacklists and ensure other ships flying the flag are additionally targeted for inspections, delays, inconveniences and possible detentions, all with significant financial implications.

⁴ Hare, J 1994, Flag, Coastal and Port State Control: Closing the Net on Unseaworthy Ships and their Unscrupulous Owners, *Sea Changes*, no. 16, pp. 57, viewed 22 August 2010, <<http://web.uct.ac.za/depts/shiplaw/portste.htm>>



100 SHIP REGISTER
10 SHIPS INSPECTED BY PSC
2 DETAINED

2 % DETENTION RATE



20 SHIP REGISTER
10 SHIPS INSPECTED BY PSC
2 DETAINED

10 % DETENTION RATE

Figure 1: Comparing effects of PSC on different sized registers detention rates

The safety crackdown (regardless of the motivation) on the other hand acts as a driver to improve flag State inspection regimes. This has happened in larger, well-established open registers which maintain high quality standards and are on regional whitelists. They have invested in developing their maritime administration and technical expertise to be able to routinely inspect ships in their registers and proactively address problem vessels. As noted in the example, for smaller competitive open registers this strategy is especially important to maintain and improve the flag's international reputation. A few 'bad apples' in the register can inflate a flag State's detention rate and deteriorate the flag's international reputation. The opposite is also true. By improving or eliminating a few repeat offenders from the register, smaller registers can significantly influence statistics in their favor and improve their international reputation.

Another major motivation of PSC is the reduction of environmental pollution. The environmental lobby has gained momentum globally as people show increasing environmental consciousness and a willingness to conserve the environment. Oil spills, regardless of the fact that they do less damage than day to day ship effluence, receive a lot more attention now. The BP Deepwater Horizon oil spill (or Gulf oil

spill), though from offshore drilling, was an example of the loss and damage of a shared marine environment. Media coverage through television, internet, streaming videos, social networks, mobile messaging and radio has been relentless. The increased media coverage of environmental incidents drives public opinion and pressures governments to act both reactively and proactively to ensure there are less of these incidents. Registries are best served by adopting robust practices that avert disaster and potentially more draconian measures from governments. 'Responsible' States can also capitalize on having excellent safety records and promote themselves as more environmentally responsible.

There may be more than meets the eye behind PSC's intentions on the issue of maintaining high safety standards. No doubt there is genuine concern for ship safety, safety of seafarers, and the environment, as these contribute to the economies of many countries. On the other hand, targeting open register vessels and blacklisting open register flags reduces the competition in the registration market. This gives the national register states more room to promote their own national and international registers.

The way forward involves greater recognition of public demands. The shipping market needs to provide low-cost consumer goods, but the public is increasingly demanding that this is done in a responsible way. Registration then will have to be able to remain competitive to provide the lowest possible costs to consumers, as well as ensuring safe shipping. This will be essential for a good reputation and high public opinion of the industry. Registers then must strike the right balance between staying competitive and staying safe and must make the necessary investment as well as create a culture that supports this.

4.2.3 Crewing

In shipping's competitive environment, countries with small seafarer populations that do not have to factor in seafarers' issues are attractive economic incentives to shipowners. Traditional maritime states with large, well-developed seafaring labour organizations do not have the same luxury and must take crewing and related crew concerns (wages, agreements, conditions) into consideration in the development of legislature. Crew costs have significant implications on operating costs. Annual crew costs of typical vessels operating under Northern European national registers can be between two to four times those of the typical open registers.⁵

This may disadvantage traditional national register States, all other conditions being equal, in terms of economics. However, various reports on ship groundings, ship collisions, and marine pollution-causing accidents suggest that human error resulting from fatigue is the primary cause (or a major contributory cause) of these incidents.⁶ Fatigue onboard most often results from poor physical working conditions (excessive noise, vibration and heat) coupled with long working hours, disturbed sleep and shift work patterns. Shipping companies operating in national registers are often bound by minimum working standards and crewing agreements which help to minimize fatigue. Companies competing for business require timely delivery of goods and reliable crews are a significant determinant in maintaining consistent and efficient delivery. The human resource aspect of shipping needs to be strategically approached for the benefit of the industry and universal crewing minimum standards need to be put in place or the future shortage of seafarers will become a reality.

⁵ Downward, J 1989, *Running Costs*, Fairplay Press, London

⁶ Li KX & Wonham J, 2001, Maritime legislation: new areas for safety of life at sea, *Marit. Pol. Mgmt.*, vol. 28, no. 3, 225-234

4.2.4 Taxes

The choice of registry by shipowners is influenced by a variety of factors not the least of which are economic incentives. Tax and fee structures directly impact on the revenues of flag States. Ship owners have benefited from the tonnage tax regimes of open registers. Indeed the Rochdale Report, which is still used by the ITF as a basis for determining FOCs, condemns open registers as FOCs and one of the listed conditions is as follows:

*(iii) taxes on the income from the ships are not levied locally or are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;*⁷

Thus the cost benefit ratio is a strong economic motivator for shipowners to consider open registers. However, this must be contemplated in the light of shipowners' benefits from competition amongst registers. National registers also offer owners attractively packaged incentives: investment grants, subsidies, tax rebates, tax deferrals, accelerated assets write off due to depreciation and the same tonnage tax regimes offered by open registers.⁸ In fact, the tax concessions of national register States tend to be generous and are comparable to the ITF standard for FOCs.

*“...in Western Europe the concessions are believed to be particularly liberal, and shipowners who not only operate ships, but also buy and sell on a large scale do not appear to have any difficulty in minimising their taxes to a low level or even avoiding taxes altogether.”*⁹

Where then is the dividing line? How do shipowners differentiate between registers

⁷ Committee of Enquiry into Shipping—Report, Cmnd 4337, HMSO. (*The Rochdale Report*)

⁸ Coles, R & Watt, E 2009, *Ship Registration: Law and Practice*, Informa, London, Section 3

⁹ UNCTAD, *Action on the Question of Open Registries*, TD/B/C.4/220, paragraph 26

when competition is so strong and differences so minimal? Today, a register's reputation is also an economic commodity. It is not enough for a flag to be low cost because any gaps in its compliance with international maritime standards eventually lead to higher costs to shipowners. Reputation translates into economic incentives when flags States are whitelisted within the PSC networks and are subject to lower inspection and detention rates. This reduces port turn around time and inconveniences to the shipowners resulting in economic advantage. Quality flags also have streamlined and efficient administrative arrangements to facilitate the technical demands of shipping. Incentives like fee waivers and tax deferrals or additional ship discounts are only short term incentives, improving the quality of the register is an investment that pays in the long term.

A downside to the competition for ships however, is that shipowners are motivated to go beyond the low tax regimes and exploit the companies registers in the process. This idea was examined in relation to national registers in chapter 3. However, exploitation of companies registers goes beyond foreign ownership and control and extends to owner anonymity and attempts to escape accountability.

Regardless of the type of ship register, shipowners set up limited liability companies specifically for ship owning purposes which have no other asset but the particular vessel. Typically, owners of multiple vessels set up multiple companies separating each ship to further limit liability and isolate financial risks. As noted in chapter 3, the conditions for incorporation of a shipowning company, where they are required, tend not to be particularly demanding. With the rise of anti money laundering regulations, transparency of the beneficial owners of shipowning or other national companies is demanded and few jurisdictions still offer bearer share options. Shipowners may circumvent the regulations through offshore jurisdictions, where registered shares are still standard practice. The share capitals of the companies are registered in the name of the offshore companies whose capitals are then represented by bearer shares. This effectively obscures the beneficial owner. Profits of the

shipowning company may also be deposited in bank accounts of other companies incorporated for this purpose.

Effectively, some shipowners are then able to avoid transparency requirements by maintaining anonymity and evading taxes. By remaining anonymous, they can potentially abscond from any liabilities such as crew remuneration, ship accidents, and fines. Anonymity is also a security risk since terrorists or other criminal organizations can utilize registers for their own aims. Open registers with offshore jurisdictions are particularly vulnerable since often they do not have incorporation requirements. To improve safety, security, and accountability, registers must find ways to increase transparency of the transactions of shipowners. Mechanisms to protect the confidentiality of beneficial owners, but ensuring that their true identities have been established is a common sense approach to the problem. As is the case with security, if the industry does not address it sooner rather than later, their options may become limited as governments pressurize them to do so.

4.2.5 Anti-fraud measures

The 9/11 attack became the impetus for IMO's passing of amendments to the 1974 SOLAS convention, amendments which are now known as the ISPS Code. The Code responds to the international demand for security assurance in the light of terror threats. The ISPS Code was intended to strengthen maritime security and suppress acts of terrorism against shipping but the scope of security implied extends much further. The US government and the maritime unions urged ship registries to list the beneficial owners of vessels, not only to track down the reputed fleet of ships owned by al-Qaeda but also shipowners who avoided paying debts owed to crew. Corporate confidentiality laws of flag States were ignored. The Americans indicated that non-compliant ships could not call at US ports.

Anti-money laundering legislation was also designed to sustain audit trails so that those who try to hide their identity to defraud others could be tracked and brought to

justice. This requires not just the recording and reporting of unusual or suspicious transactions, but adequate records for the proper tracking of beneficial owners of companies to make possible the criminal prosecution of money launderers.

The compliance on the government side of the ISPS Code is a little more imprecise. There is no external authority empowered to implement it and each government is responsible to implement and maintain its security. This leaves potential for gaps in safety and security. However this situation is not unique to anti-fraud measures, the security initiatives of the World Customs Organization (WCO), the US Container Security Initiatives (CSI) and IMO initiatives all rely heavily on State implementation and enforcement. Therefore, regardless of the precision of the framework that forms the core of international safety and security structures, implementation and enforcement remains the weakest link.

At times, States will have conflicting interests (mainly economic) that can compromise compliance with these security measures. In developing international law such as anti money laundering legislation, institutions would do well to more comprehensively consider implementation and compliance. States need to be persuaded that these initiatives are in their best interest, economic and otherwise. One way to make the case is to further research the costs and benefits of these initiatives to individual States or regions which may act as a stimulus for compliance. If evaluated by region, this could lead to mutual accountability, regional cooperation, and the pooling of resources for the benefit of all involved.

4.2.6 Registration: Overall Process and Information Technology

The International Maritime Organization (IMO) has been involved in the ship registration issue since its first Assembly meeting in 1959. The IMO has gone on to develop the majority of the relevant international maritime standards and is one of the most prolific international organizations today. It has helped improve safety and reduce casualties in shipping through a system of international consensus. It has also

had a principal role in making ship registration processes more streamlined and efficient.

The challenge however is not mainly in shipping's basic regulatory framework (the laws and the standards), but in their implementation and enforcement. At present, flag States generally self-monitor their compliance with IMO treaties. This system is fraught with the potential for misuse and misapplication.

A fundamental feature in IMO international treaties is that each administration takes responsibility for promulgation of laws and regulations. This includes all necessary processes, in order that treaties have 'full and complete effect' to ensure ship safety, safety of life at sea, and the protection of the marine environment.¹⁰ As a progression from simple self monitoring, the IMO pursued a Voluntary IMO Member Audit Scheme (VIMSAS) in November 2003 in order to harmonize international maritime standards implementation in flag States.¹¹ The scheme addresses flag State's putting into practice IMO instruments through national legislation, and administering and enforcing these applicable laws. The related control and monitoring mechanisms for the ship registration survey and certification process are also included in this assessment. Flag States involved in the scheme mutually assess each other for conformity to the IMO instruments. This scheme still has room for misuse and abuse and may be manipulated according to economic and political aims but it is a step in the right direction. The IMO trend of introducing voluntary compliance programs, recommendations and 'soft law' followed by codification into mandatory requirements in international law means that VIMSAS is likely to become mandatory in the near future. In fact, discussions started at the 100th session of IMO Council meeting in June 2008 on whether VIMSAS should

¹⁰ *Code for the Implementation of Mandatory IMO Instruments*, Resolution A. 973 (24), Annex, paragraph 4.

¹¹ *Voluntary IMO Member State Audit Scheme*, Resolution A.946(23)

become mandatory (MIMSAS).¹²

4.2.6.2 Information Technology

Information Technology (IT) has improved not only the quality of service in ship registers but has also facilitated the growth of open registries. It can help smaller registers with limited personnel and resources to provide professional ship registration services and compete globally. Through encrypted software platforms, register headquarters can be linked electronically to international stakeholders worldwide. This gives easier, speedier access to ship register services. Existing software allows registers and international representatives to maintain secure and easy access to comprehensive information on each vessel in the fleet, including: vessel type, tonnage, registration data, survey information, certification, documentation, fee charges and a complete history of the changes to vessel records. This information can be stored, retrieved, updated, analyzed and reported in real time cost effectively; thus allowing for a more efficient and professional service to the increasingly larger fleets.

A crucial area that IT helps registers to better manage is the day to day processes of registration: to produce performance reports; receive real time accident and casualty reports and PSC updates; schedule follow up surveys and inspections; and generate survey certificates. By doing this, IT facilitates registers who wish to improve their overall safety and compliance with international standards. In the future, it can help with alerts about unsafe vessels, missed inspections, and random audits (should VIMSAS become mandatory). This wealth of information can go even further in terms of recognizing trends and systematic failures within the industry and

¹² Mansell, JNK 2009, *Flag State Responsibility: Historical Development and Contemporary Issues*, Springer Dordrecht Heidelberg, London, p. 147

identifying shipping companies and registers falling outside the normal distribution, outliers whose best practices can be adopted or failures addressed. It can help in targeted inspections and facilitate safety research in areas of technical regulations and management systems.

IT is only a tool but it has profound consequences in shipping. It needs to be utilized responsibly with more than just technical competence in order to continue the development of ship registration processes. Registers need to contemplate the security of their IT systems and ensure their robust protection. International committees have to start looking at guidelines for these innovations to encourage their responsible use, noting potential for fraud and abuse will grow as the technology grows.

4.3 CONCLUSION

Hybrid is the future

In biology, the aim of cross breeding is to combine the desirable traits of two or more varieties to achieve an improvement in the species. The successful registers of the future will be the hybrid registers; those that draw on the most desirable traits from both open and national registers to create the best of both worlds.

Registers today are already headed in this direction; they are blurring the lines of distinction between open and national registers in the interest of competitive advantage. National registers are revamping their bureaucratic image and offering numerous economic incentives such as lower taxes and subsidies. Open registers are adopting higher quality standards to boost their international reputation. The hybrid registers that can successfully combine high quality standards, efficient administrative procedures, and effective technical expertise with economic incentives will ultimately be the most fit to survive the competition. The solution is

steady development through the simple and effective technique of sampling best practices from each to create flexible registration systems adapted to the needs of the State. This allows for the incorporation of the economic advantages without weakening essential safety and security features. Only the registers that adapt will survive in the globally competitive arena of shipping.

CHAPTER V: CONCLUSION

5.1 Introduction

Ship registration has outgrown its original concept, which was principally a way to control cargo-carrying vessels of maritime nation States. In the international public law context, it determines which State's jurisdiction and laws apply onboard. In private law, it establishes *prima facie* evidence of ownership. In amalgamated public/private law concepts like 'genuine link', registration is an expression of flag States' rights and freedoms to establish registration requirements and their duties and obligations in accordance with the international law of the sea.

The objective of this dissertation was to scrutinize ship registration systems. This is done in a fashion that provides objective assessment of the issues that arise in the different types of registration systems.

5.2 Legal Concepts

To fulfill its intent, the stage was set with the background of the general legal concepts that form the legal basis of ship registration. The importance of the relationships of nationality, registration, and documentation within the context of ship registration was developed. These basic legal principles were used to demonstrate their implications and significance in an international public law and private law context. All this then provided the basis for the types of ship registration systems that exist today.

5.3 Ship Registers

The discussion moved on from the historical background and rationale to an exploration of ship registration systems itself. The origins of 'flags of convenience'

were studied, followed by explorations of each type of registry (national, open, and hybrid). The characteristic features of each type of registration were developed and contrast was drawn between theoretical and actual working examples of successful/competitive registers within each category.

In the context of national registers, the presence of foreign control or foreign ownership was investigated with interesting results. It illuminated the fact that this feature is not unique to open registers. This led to the conclusion that national register States can really only be distinguished from open registers by the crewing requirements (which may be a mechanism to protect employment for seafarers in traditional maritime states).

The development of the open registry was explored as a system that resolved the issues of rising operating costs and maintained if not encouraged the growth of the shipping industry in the 20th Century. As an extension of the discussion on open registers, the concept of ‘genuine link’ was enlarged in terms of its historical development and use within ship registration.

The discussion progressed through the development of hybrid registers. These blend, in varying proportions, the desirable traits of each register and may also have varying degrees of foreign control or ownership. The story of hybrids is not always positive and the drawbacks of failing to find the right balance were looked at. Hybrids have the economic features of open registers but the reputation of national registers for technical and regulatory control; and this where their strength lies.

5.4 The Future of Ship Registration

The principal tension in shipping is between traditional and non-traditional flag States in terms of economic power (and control). The contemporary challenges in shipping were examined and the aspects of the industry likely to undergo significant transformation were explored. These included security, safety standards, crewing,

taxes, and the overall registration process. Consideration was given to the influence of the changing perspectives of the international maritime community and public demand for security assurance and responsible shipping. Registers then must strike the right balance between staying competitive and staying safe, incorporating universal crewing minimum standards and security measures as part of the basic registration requirement. The lack of transparency of vessel ownership was a topic that straddled both economic and security concerns. International committees have to start looking at guidelines to encourage responsible use of maritime innovations, to increase transparency of transactions of shipowners and to research the costs and benefits of maritime initiatives so that it acts as a stimulus for compliance.

The future of shipping will belong to registers that can successfully balance the competing interests of the industry yet remain competitive. In fact, the artificial constructs of ship registration categories will become increasingly blurred as registers creatively adapt to the shipping industry's changing needs. Hybrid registers are the future of shipping.

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